In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 330

RALPH CONTI AND DAVID NEWMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, II. 99-100)[1] is not yet reported. The opinion of the district judge on a pre-trial motion to suppress is reported at 232 F. Supp. 1004 (S.D.N.Y.)

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[1] References to "II" are to Volume II of the certified record consisting of the government appendix below supplemented by proceedings in the court of appeals. References to "I" are to Volume I of the certified record, which consists of petitioners' appendix in the court below.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1966 (II. 111). A petition for rehearing was denied on June 28, 1966 (II. 124-130). The petition for a writ of certiorari was filed on July 11, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the various provisions of the wagering tax statutes infringe upon the Fifth Amendment privilege against self-incrimination.
2. Whether a search warrant was properly issued.
3. Whether the search was properly executed.

STATEMENT

Petitioners were convicted of wagering tax violations after a trial by jury in the United States District Court for the Southern District of New York. Petitioner Conti was convicted on Count 1, which charged a willful attempt to evade and defeat the excise tax on wagers (I. 8-9, 214).[2] Both petitioners were found guilty of the remaining counts which charged willful failure to file and make a return of the excise tax on wagers, willful failure to pay the excise tax on wagers, willful failure to pay the occupational tax imposed on those engaged in the business of accepting wagers, and willful failure to register as engaged in the business of accepting wagers (I. 214).

[2] The jury disagreed and returned no verdict on Count I as to petitioner Newman (I. 214).

Petitioner Conti was sentenced to imprisonment for one year on each count (to be served concurrently) and fined $5,000 on Count 1 and $1,000 on each of the other counts (I. 5). Petitioner Newman was sentenced to imprisonment for three months on each count (to be served concurrently) and fined $250 on each count (I. 4).

The relevant facts show that on Janary 20, 21, and 22, 1964, Federal agents of the Internal Revenue Service conducted a surveillance of Apartment B, 1582 First Avenue, New York City (II. 2-8, 9-13, 13-16, 23-30). During that time they were able to place horse-race wagers, using a code name, by calling TR 9-2265, a telephone located in Apartment B (II. 2-3, 5, 8). By stationing themselves inside the apartment building behind a door leading to a cellar, agents were able to observe petitioners enter or leave Apartment B (II. 4-5, 14-15, 16). Petitioner Conti was observed carrying papers and a small shopping bag (II. 5-6, 8, 10, 11, 15).

On January 22, 1964, a commissioner issued a search warrant authorizing the search of Apartment B for gambling paraphernalia on a finding that there was probable cause to believe that the premises were being used to commit a gambling offense in violation of 26 U.S.C. 4401, 4411, 4412 and 7272 (I. 14-15). The affidavit to support the application for the search warrant, executed by a revenue agent, stated that he had reason to believe that concealed on the premises were gambling paraphernalia used in committing a wagering offense in violation of 26 U.S.C. 4401, 4411, 4412 and 7272. The affidavit continued (I. 13):

> And the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: testimony of a Special Agent of the Internal Revenue Service; who: 1) placed horse bets by telephoning number TR 9-2265; 2) that investigation has disclosed that the telephone number is installed at Ground Floor Apartment B at 1582 First Avenue, New York, New York; 3) that a search of the records of the Internal Revenue Service reveal that none of the persons residing at the aforementioned address have paid the Special Tax imposed by Title 26, United States Code, Section 4411; and 4) that wagers were placed by the Special Agent on January 20, 21, 1964.

Armed with this search warrant, agents Cotter and Riley entered the building (II. 17, 30), the outer door of which was unlocked (II. 9, 12-13, 53, 97). They stationed themselves behind the cellar door, which was also unlocked. By leaving the cellar door slightly ajar they were able to observe Conti open the door to Apartment B with a key. As Conti opened the door, Cotter crossed the hallway, announced in a loud voice that he was a federal agent with a search warrant, and entered the apartment (II. 17, 31). Conti flipped the keys to the floor and followed agent Cotter into the apartment. Agent Riley, who was following, retrieved the keys (II. 18). Meanwhile, agent Cotter discovered petitioner Newman taking a telephone bet (II. 31-32).

A search of the apartment disclosed various betting slips and other gambling paraphernalia including two telephones, one of which bore the telephone number

which Cotter had previously used to place a bet (II. 20-23, I. 15). Petitioners were thereupon arrested (II. 33-34).

Upon being told that he was being arrested for not having a federal tax stamp, Conti said that they "hadn't caught him taking a bet" (II. 20, 34). The agents also seized the sheets listing basketball odds and $1,845 that Conti was carrying into the apartment (II. 33-35). After Newman was arrested he told the agent on the way to headquarters that "he had read of bookmakers being arrested by Treasury agents for not buying the bookie tax stamp" (I. 65).

Agent Cotter thereafter deciphered the code used to record the bets, and he was able to trace the bettors (II. 48-50), some of whom testified as to the bets they had placed (See II. 55-61, 78-84, 84-95). From the paraphernalia seized it was determined that that day's gross wagers amounted to $3,900 (II. 52).

ARGUMENT

1. In *Costello* v. *United States*, No. 41, this Term, this Court has granted certiorari to review the constitutionality of the wagering tax statute insofar as it involves a prosecution for failure to register and pay the occupational tax. Two of the counts on which petitioners were convicted and on which they received separate fines involve the same charges as those involved in *Costello*.

The validity of a prosecution for failure to pay the excise tax is also before this Court on petition for a writ of certiorari in *Grosso* v. *United States*, No. 181,

this Term. For the reasons stated in the government's brief in opposition in that case, we think that a prosecution for failure to pay an excise tax or for evasion of such a tax does not present the problem which is before the Court in *Costello*. This case does, however, also involve a count charging the failure to file a return with respect to the excise tax, a charge not involved in *Grosso*. The decision in *Costello* may possibly have a bearing on that count as well. Consequently, although petitioners did not fully preserve the issue,[3] we agree that it would be appropriate for the Court to defer consideration of this petition until after the decision in *Costello*.

2. Petitioners make several assertions regarding the adequacy of the affidavit on which the search warrant was based. There is no merit to the argument that the statutory section cited in the warrant as having been violated did not relate to the precise offense alleged in the affidavit. That issue was not raised at trial and cannot, in any event, invalidate the warrant. So long as sufficient facts are alleged in the affidavit to show that an offense was being committed, the warrant is valid. A mis-citation of a statute in a warrant, like a mis-citation in an indictment (Rule 7(c) F.R.Crim.P.), does not render it invalid. Petitioners' other contentions regarding the warrant (Pet. 10-12) amount to the exercises in "[t]echnical requirements of elaborate specificity once exacted un-

[3] There was no motion to dismiss before trial. Only after the jury found petitioners guilty, did they, as part of a general objection under the Fourth and Fifth Amendments, mention the privilege against self-incrimination (see I. 229, 230).

der common law pleadings" which this Court disapproved in *United States* v. *Ventresca*, 380 U.S. 102, 108.[4]

3. Petitioners' attack on the execution of the search warrant (Pet. 12-16) is unsound. Petitioners did not assert in the district court that their constitutional rights had been violated by entry into the hallway of the apartment house or into the area leading to the cellar. Indeed, the record shows that these areas were unlocked and freely accessible. Nor is there merit to petitioners' contention that under 18 U.S.C. 3109 there must be, after announcement, an affirmative refusal to allow entry before officers may enter the premises to be searched. In this case, after making their announcement, the agents entered, without using any force, through an open door, and one of the petitioners threw his key to the floor. The purpose of the statute is to prevent the unnecessary use of force to obtain entry, but no valid statutory purpose would be served by requiring a formal refusal before officers may enter.

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[4] *Sgro* v. *United States*, 287 U.S. 206 is inapplicable. The present affidavit stated that the wagers were placed on January 20 and 21. Thus the search warrant issued on January 22 was, unlike *Sgro*, sufficiently close in time to support probable cause.

CONCLUSION

For the foregoing reasons, we believe that action on the petition for a writ of certiorari should be deferred until after this Court's decision in *Costello* v. *United States*, No. 41, this Term.

Respectfully submitted,

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